1932 *Present :* **Jayewardene A.J.**

PRINS *v.* SABARATNAM.

485—P. C. Colombo, 39,093.

Opium Ordinance—Seizure of opium in accused's possession—Failure to seal before removal to Police Station—Irregularity not fatal.

There is no inflexible rule that excise articles seized should be sealed immediately after seizure in the presence of the accused, before they are taken to the Police Station.

It depends on the circumstances of each case whether the failure to seal in the presence of the accused affords a good defence or not.

APPEAL from a conviction by the Police Magistrate of Colombo.

No appearance for appellant.

H. L. Wendt, C.C., for respondent.

August 24, 1932. JAYEWARDENE A.J.—

The accused has been convicted under the Opium Ordinance, 1910, for possessing four pounds of opium. On April 24, Inspector Prins, having received certain information, followed the accused from the Maradana Railway Station after the arrival of the Jaffna train at 6.30 A.M. He stopped the accused's rickshaw opposite the Socony Petrol Station in Skinner's road south and took the accused inside the depôt. He opened the accused's trunk with a key which the accused produced from his purse and found in the accused's trunk a pillow smelling strongly of scent on the top and under it a *verti* cloth with toilet powder spread on it. Under that he found four pounds of opium and ten pounds of ganja. He took the accused and things to the Kotahena Police Station and sealed them in the presence of the accused with a Police seal. He placed the trunk with that seal on it and a label signed by the accused and produced everything at the Police Court on the next day. The accused when charged merely said that he was not guilty and would file his list of witnesses later. The Inspector was corroborated in every material particular by Constable Benedict. The accused admitted the arrest and search, and also that he signed the label on the trunk. He says that the Inspector may have introduced the opium and ganja at the instigation of his enemies. The Police Magistrate has held that the case for the prosecution was well proved and that he had no doubt whatever that the accused was caught exactly as stated by the Inspector with four pounds of opium in his trunk. It was contended that the accused was entitled to an acquittal because the Inspector did not seal the productions as soon as they were found but later at the Police Station. In *Kalpage v. Cassim*[1] A. St. V. Jayewardene A.J. held that an objection, that certain tins taken from the possession of the accused, a vedarala, were not sealed in his presence, was a good one. The accused there asserted that the medicine found later in the tins was not the medicine in them at the time they were removed from his premises. Jayewardene A.J. remarked "It was possible for such an introduction to have taken place and in cases of this kind we have to see that whatever is found in the accused's possession is not tampered with . . . . I think the failure to seal them entitles the accused to take the objection that the ganja might have been introduced between the seizure at his dispensary and its sealing at the Police Station". This case was followed in *Holsinger v. Joseph*[2], where the circumstances were similar. The principle of these cases was adopted in *Wijesekere v. Pakir*[3] and *Fernando v. Mudalihamy*[4]

[1] *580 P. C. Colombo. 22,098 S. C. M. 14.9.26.*
[2] *31 N. L. R. 250.*
[3] *698 P. C. Kurunegala, 17,924 S. C. M. 24.9.30.*
[4] *1 C. L. W. 897.*

Referring to them in *Almeida v. Fernando* [1], Lyall Grant J. said that in neither of them were the packages sealed in the accused's presence and there was a reasonable possibility that they might have been tampered with. The remarks of Lyall Grant J. in setting aside the acquittal and sending the case back for trial are relevant. "In the present case the Inspector says that he found the stuff in the presence of the accused, that he went with the productions and the accused to the Police Station, that he weighed the opium in the presence of the accused, and that he got the Police to seal the productions in the presence of the accused. There is, of course, always the possibility of fraud if the Inspector is dishonest, but that possibility exists even where the productions are sealed immediately. In that event it might be alleged that the Inspector had substituted similar sealed packages . . . . The productions were sealed in the presence of the accused and so far as the case has gone there is no evidence that he at that time raised any question as to their being the articles seized in his house".

It was held in *Ponniah v. Pitche* [2] that the Excise Ordinance, No. 8 of 1912, nowhere lays down that an excisable article should be sealed in the presence of the accused immediately after seizure, and that it depends on the facts of each case whether the failure to seal in the presence of the accused affords a good defence or not.

The Opium Ordinance is similar to the Excise Ordinance and the same principles apply. After examining the authorities, I am of opinion that there is no imperative or inflexible rule that the articles or things seized should be sealed immediately after seizure in the presence of the accused and before they are removed to the Police Station. The delay in the sealing, and informalities in the manner in which a search is conducted, are circumstances to be weighed in the consideration of the case and often diminish the weight of the evidence given as to the possession of the incriminating articles, and have seriously affected the credit to be attached to the evidence in many cases. They do not however preclude the admission of such evidence. It seems desirable, nevertheless, that the articles found should be sealed, wherever practicable, immediately after search in the presence of the accused and before removal to the Police Station. Failure in this respect is not an irregularity fatal to a conviction for unlawful possession, provided that the oral evidence is otherwise satisfactory.

The conviction is right, in my opinion, both on the facts and on the law. The Magistrate has considered the question of sentence. I affirm the conviction and sentence.

Affirmed.

[1] *31 N. L. R. 331 at p. 333.*

[2] *P. C. Puttalam, 13,969 S. C. M. 24.3.31.*